EON BANK BERHAD

v.

LOYALEX INDUSTRY (EM) SDN BHD & ORS

HIGH COURT MALAYA, KUCHING
MUHAMMAD KAMIL AWANG J
[SUIT NO: 22-126-98-III(II)]
24 NOVEMBER 1998

CIVIL PROCEDURE: *Pleadings - Defence - Application for extension of time to file - Defendant entered late appearance - Whether entitled to serve late defence - Principles in granting extension of time to file defence out of time - Whether there is merit in defence - Whether mere denials - Rules of the High Court 1980, O. 12 rr. 4(b), 5(2)*

This was the 3rd defendant's ('the defendant') application for an extension of time to serve his defence. The plaintiff had earlier filed and served its writ of summons on 7 July 1998. The defendant served his memorandum of appearance on 19 August 1998 and statement of defence on 26 August 1998. The plaintiff refused to accept service on account that the defence was served out of time.

Held:

[1] Under O. 12 r. 4(b) of the Rules of the High Court 1980 ('the RHC'), the defendant had to enter an appearance by 16 July 1998. However, he was entitled to enter a late appearance pursuant to O. 12 r. 5(2) of the RHC, but would not be entitled to serve his defence any later than 30 July 1998 unless the court so orders.

[2] Insofar as procedural non-compliance is concerned, the court will always weigh the default against the justice of the case as a whole. A defence delivered out of time must nevertheless be considered. The courts do not invoke procedural rules to prevent a defendant from defending an action unless there is clearly no merit in the defence.

[3] The 'defence' consisted of bare denials which did not amount to a defence. Further, the plaintiff's notice of demand was properly posted to the defendant's last known address and the defendant must be deemed to have received it. Hence, there was no merit in the defence.

[Application for extension of time to serve defence dismissed.]

Case(s) referred to:

Aleykutty James v. Syed Putra Syed Omar Shahabudin & Anor [1979] 1 MLJ 238 ***(refd)***

Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1 ***(refd)***

Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 ***(refd)***

Foo Chiew Fong v. Guriman [1957] MLJ 51 ***(refd)***

Gibbings v. Strong [1884] 26 Ch D 66 ***(refd)***

Gill v. Woodfin [1884] 25 Ch D 707 ***(refd)***

Idris Haji Salleh v. Federal Auto Holdings Bhd [1979] 2 MLJ 141 ***(refd)***

Lee Thean Chye v. Lim Chow Chong [1973] 2 MLJ 100 ***(refd)***

MJH Sdn Bhd v. Jurong Granite Industries Sdn Bhd [1991] 3 CLJ 2885 ***(refd)***

Metrojaya Bhd & Anor v. BTC Clothier Sdn Bhd [1996] 5 MLJ 45 ***(refd)***

Teck Guan Trading Sdn Bhd v. Hydrotek Engineering (S) Sdn Bhd [1996] 1 BLJ 163 ***(refd)***

Thomas Booty, Edwards & Partners [1964] MLJ 359 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 12 rr. 4(b), 5(2), O. 18 r. 2(1)

Other source(s) referred to:

Mallal's Supreme Court Practice, 2nd edn, p 211

For the plaintiff - George Chapman; M/s Lim Tan & Partners

For the 3rd defendant - Stanley Eddy; M/s Battenberg & Talma

Reported by Gan Peng Chiang

JUDGMENT

Muhammad Kamil Awang J:

This is the 3rd defendant's application for extension of time within which to file and serve the statement of defence on the plaintiff. The application is opposed by the plaintiff on the grounds that the defence was served out of time and that there was no merit at all in the defence.

Brief Facts

The plaintiff filed and served a duly endorsed writ of summons on the 3rd defendant on 7 July 1998. Then on 12 August 1998 a certificate of non-appearance was entered against the 3rd defendant.

The defendant's solicitors served a Memorandum of Appearance on the plaintiff on 19 August 1998. The plaintiff's solicitors gave the defendant's solicitors a 48-hour notice to enter judgment in default of defence and served it on 24 August 1998. The defendant's solicitors then served on the plaintiff's solicitors a statement of defence on 26 August 1998 which was out of time. The plaintiff's solicitors refused to accept service.

Although the defendant had to enter an appearance by 16 July 1998 pursuant to O. 12 r. 4(b) of the Rules of the High Court 1980, the defendant was entitled to enter a late appearance pursuant to O. 12 r. 5(2) which stipulates that:

> (2) Except as provided by paragraph (1), nothing in these rules or any writ or order there under shall be construed as precluding a defendant from entering an appearance in an action after the time limited for appearing, but if a defendant enters an appearance after that time, he shall not, unless the Court otherwise orders, be entitled to serve a defence or do any other thing later than if he had appeared within that time.

Under O. 12 r. 5(2) it is clear that the defendant is not entitled to file a late defence unless the court orders otherwise. It must be remembered that under O. 18 r. 2(1) of the Rules of the High Court 1980, which states that a defence must be served on the plaintiff before the expiration of 14 days after the time limited for appearance, which, in this case, was 30 July 1998. The defendant had failed to do so.

It is the practice of the court that each case is decided on its own merits, and does not invoke procedural rules to prevent a defendant from defending an action unless it is clearly shown that there is no merit in the defence: See *Foo Chiew Fong v. Guriman* [1957] MLJ 51 (CA) and *Lee Thean Chye v. Lim Chow Chong* [1973] 2 MLJ 100.

In *Aleykutty James v. Syed Putra bin Syed Omar Shahabudin & Anor* [1979] 1 MLJ 238 the defendant therein entered a late appearance and filed the statement of defence out of time. It was held that as the defendant had entered appearance after the time limited by the writ for appearance it was necessary of course to consider whether the defendant should be entitled to further time for delivering his defence.

In another case, *Idris bin Haji Salleh v. Federal Auto Holdings Bhd* [1979] 2 MLJ 141 Syed Agil Barakbah J (as he then was) held that the accepted rule is that a defence delivered after the proper time cannot be disregarded even though it is not delivered until after the plaintiff has served notice for judgment and in such a case the court will have regard to the contents of the defence delivered out of time and deal with the case in such a manner that justice can be done. See also *MJH Sdn Bhd v. Jurong Granite Industries Sdn Bhd* [1991] 3 CLJ 2885.

Insofar as procedural non-compliance is concerned, the court would always weigh the default as against the achievement of justice of the case as a whole: see *Metrojaya Bhd & Anor v. BTC Clothier Sdn Bhd* [1996] 5 MLJ 45. It has been stated in *Thomas Booty, Edwards & Partners* [1964] MLJ 359 at p. 360 Wylie CJ (Borneo) as follows:

> We are concerned only with the application of rules of procedure. These applications should not amount to a denial of the principles of justice. It is for these reasons that extensions of time are usually granted as a matter of course unless there are very strong circumstances to show that these are delaying tactics or some major feature of that nature.

There have been ample authorities to establish the rule that a defence delivered out of time must nevertheless be considered. In the case of *Idris bin Haji Salleh v. Federal Auto Holdings Bhd (supra)* Syed Agil Barakbah J (as he then was) cited and followed the case of *Gill v. Woodfin* [1884] 25 Ch D 707, (CA) and *Gibbings v. Strong* [1884] 26 Ch D 66 (CA) in allowing the defendant's application for extension of time to file their defence.

The Defence Has No Merit

The plaintiff submitted that the defence has no merit at all. The 3rd defendant admitted that he executed the joint and several guarantee dated 6 October 1997 (exh. TSK 2), but denied that he had agreed to guarantee repayment on demand of all moneys due and owing by the 1st defendant to the extent of RM1,000,000 plus interests thereon. It seems that the defence consists of bare denials, and these do not constitute defence. In *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690; [1995] 2 MLJ 363, the Court of Appeal held that denials in a defence do not constitute evidence and they are only challenges to the other side to show proof. In *Mallal's Supreme Court Practice*, 2nd edn, p. 211 it is stated thus:

> A defendant ought not to deny by his statement of defence plain and acknowledged facts, which is neither to his interest nor in his power to disprove.

At page 212:

> A general traverse in a pleading, whether in the form which "denies" or in the form which "does not admit" (between which forms no effective distinction can now be drawn), does no more than put the other party to proof of the allegations denied.

Clause 1 (exh. TSK 2) specifically provides that the 3rd defendant "jointly and severally guarantee payment on demand upon us of all money and liabilities whether certain or contingent now or hereafter owing or incurred to the bank (the plaintiff) from or by the customer (1st defendant) ...". The proviso in cl. 1 thereto further stipulates that "the total sum recoverable from us hereunder is limited to the sum of RM1,000,000 ... together with such further sum for interest thereon ..."

The 3rd defendant denied (para. 4 of defence) having been served with a letter of demand by the plaintiff in accordance with cl. 18 of the Joint and Several Guarantee. Clause 18 states that:

> Any notice or demand hereunder shall be deemed to have been sufficiently given if sent by prepaid letter posted to the address last known to the Bank ... and shall be assumed to have reached the addressee in the course of post...

The letter of demand was sent to the 3rd defendant's last known address gathered from a company search conducted at the Registrar of Companies on 26 March 1998 (exh. TSK6). In *Teck Guan Trading Sdn Bhd v. Hydrotek Engineering (S) Sdn Bhd* [1996] 1 BLJ 163; [1996] 4 MLJ 331, Ian Chin J at p. 341 said:

> The words of the clause allow the plaintiff to choose between sending to the specific address mentioned in the guarantee or to the 'last known address'. I am unable to agree and I do not see how the plain words in the clause can be stretched to require the plaintiff to explain why they have chosen not to send to the specific address rather than to the last known address. The words do not so require. What is require of the plaintiff is that they must have sent by post the demand to the last known address of the second and third defendants. The postal receipt had been exhibited.

Since it is established that the said demand was properly sent he cannot be heard to say that the had not received it. It is deemed to have received it. See *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 2 CLJ 1; [1994] 1 MLJ 413 (FC) and *Teck Guan Trading's* case *(supra).*

In para. 5 of the defence, the 3rd defendant alleged that the 1st defendant had at all material times operated the said facility within the approved limits and had not defaulted. Further he alleged that the 1st defendant had been servicing the interests accruing on the said facility.

The plaintiff averred that the 1st defendant had at all material times defaulted in its obligations to conduct and operate the said overdraft facility within the approved limits of RM1,000,000. The plaintiff had produced in evidence statements of accounts (exhs. TSK 7 to TSK 12) for various periods, which clearly demonstrated that the overdraft facility was at the material times in excess of the approved limit of RM1,000,000.

Having scrutinised the defence as a whole, I am satisfied that there is no merit in the defence. I would, in the circumstances, dismiss the application with costs.